In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 676

JAMES BENJAMIN CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 19-37) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1966. The petition for a writ of certiorari was filed on October 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, a county councilman in Tennessee, conspired with others to obtain a "kickback" in exchange for the award of an architectural contract for the construction of a hospital under the Hill-Burton Act, 42 U.S.C. 291, *et seq.*, a federal financing program administered by the Department of Health, Education, and Welfare. The question presented is whether that conspiracy was one "to defraud the United States, or any agency thereof" within the meaning of 18 U.S.C. 371.

STATUTE INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire * * * to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
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STATEMENT

Petitioner and two others were convicted by a jury in the United States District Court for the Eastern District of Tennessee on a charge of conspiracy to defraud the United States in violation of 18 U.S.C. 371 (A. 176).[1] On August 17, 1965, peti-

[1] The record on file with the Clerk of the Court consists of the petitioner's appendix ("A.") and the government's ap-

tioner was sentenced to imprisonment for one year (A. 41). His conviction was affirmed on appeal (Pet. App. A 19-37).

The indictment alleged that the defendants conspired to defraud the United States (in particular, the Department of Health, Education and Welfare) of its right to have its program under the Hill-Burton Act (42 U.S.C. 291) administered honestly and without corruption, by soliciting and taking a $6,000 "kickback" from the architectural firm involved in the construction of a hospital (A. 8-16).

Under the Hill-Burton Act, 42 U.S.C. 291 *et seq.*, federal funds are allocated to Tennessee (as they are to other States) for the construction of hospitals and medical facilities. The funds are allocated within the State by its Department of Public Health (A. 45). In Tennessee, the federal government pays 52 per cent of the cost of construction, and the local community sponsor pays the remaining 48 per cent (A. 45-46).

In December 1962, the McMinn Tennessee County Council, of which petitioner and two of his co-defendants were members (G. 14, 18-19), agreed, on the recommendation of its hospital committee (of which petitioner and the same two co-defendants were also members), to seek approval of the construction of a hospital for the county under the Hill-Burton program (G. 14-16). Thereafter, in January 1963, an allotment of federal funds for this project was au-

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pendix ("G.") in the court of appeals, as well as a separately bound volume containing the opinion and judgment of that court.

thorized by the Tennessee Department of Public Health (A. 47; G. 11).[2] By letter of that date, the State authority advised Fred L. Keys, who was then county manager of McMinn County (A. 52),[3] that the proposed hospital had been placed on the 1963 construction schedule; that its total cost was estimated at $900,000; and that $468,000 in federal funds had been set aside for it. The letter further advised that, as soon as an architect was selected by the county a copy of the contract with him should be forwarded, and that the Public Health Department would "then acquaint him with the construction requirements of the Program." (G. Ex. 3, G. 2-3). On February 12, 1963, an architectural contract was entered into between the county and the architectural firm of Galloway & Guthrey at a fee of 6 per cent of the cost of construction (A. 48, 59). This contract was forwarded to the Tennessee Department of Public Health, which was to see that all funds, including the federal allocation, were properly spent (G. 10).

Before the architectural contract was awarded, petitioner and his co-conspirators insisted upon a "kickback" of one per cent of the estimated cost of construction, making it clear that the kickback was a condition to their award of the contract (G. 32, 36,

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[2] The Tennessee Department of Public Health had authorized the project in October 1962, before McMinn county had actually become the sponsor (A. 47).

[3] Keys was tried with petitioner and the two other councilmen; the jury found all three councilmen guilty, but returned a not guilty verdict as to Keys.

56-57). The architects were paid by the county as they performed their services, receiving about $11,900 on February 8, 1964, and about $17,600 on May 22, 1964 (A. 72-73, 84). The architects paid $6,000 to petitioner and his co-conspirators on June 4, 1964 (G. 46-47), about two weeks after the federal government had obligated itself to the project in the amount of over $400,000 (G. Ex. 2, G. 2-3).

ARGUMENT

As this court stated last Term in *Dennis* v. *United States*, 384 U.S. 855, 861: "it has long been established that this statutory language [18 U.S.C. 371] is not confined to fraud as that term has been defined in the common law. It reaches 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government,' *Haas* v. *Henkel*, 216 U.S. 462, 479 * * *." It is clear that the lawful functioning of the Hill-Burton Act, 42 U.S.C. 291 *et seq.*, is impaired and obstructed by corrupt activity of the kind in which petitioner engaged.

The government, through the Department of Health, Education and Welfare, allocates annually over $280,000,000[4] under the Hill-Burton Act program for the construction and modernization of public hospitals and other medical facilities. It would thus seem evident that there is little merit in petitioner's contention that, in effect, the federal interest here is too remote to support a charge of conspiracy

[4] See 42 U.S.C. 291a, 2661, and 2681.

to defraud the United States.[5] Diversion of funds for the construction of hospitals into the hands of individuals through kickbacks must necessarily have a deleterious effect on the federal program. And quite apart from any pecuniary loss to the government,[6] we submit that the proper administration of the federal program, including ultimately the quality of the projects built in great measure with federal funds, is obstructed, and the program's success impaired, when local officials let contracts not on the basis of merit, but because the contractor is willing to indulge the corruptness of those local officials by agreeing to pay them kickbacks. Accordingly, the decision of the courts below that petitioner defrauded the government was proper and does not warrant further review in this Court. See, *e.g.*, *Harney* v. *United States*, 306 F.2d 523, 526-527 (C.A. 1); *Langer* v. *United States*, 76 F.2d 817, 823 (C.A. 8).[7]

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[5] See Pet. 16-17: "There has been no real showing that a lawful governmental function has been interfered with or obstructed. * * * The indictment and proof in support thereof are too nebulous and imprecise to show a *real* violation of § 371." (Emphasis in original.)

[6] The court of appeals held that the jury could have reasonably concluded that the kickback resulted in an increase in the architect's fee, and hence in an increase in the cost of the project which would in part fall on the federal government (Pet. App. A 29-30).

[7] *United States* v. *Kaiser*, 179 F. Supp. 545 (S.D. Ill.), upon which petitioner relies (Pet. 10-14), is clearly distinguishable. In that case it was held that a conspiracy to embezzle funds from a local toll-bridge was not an offense against the United States under Section 371. The government had made no con-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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tribution to the construction or maintenance of the bridge, and the federal interest asserted was quite remote: that Congress had authorized construction of bridges over navigable waters and that the government would eventually benefit when the bridge became toll-free, a possibility neither certain nor imminent.

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